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15 UNITED STATES DISTRICT COURT
16 CENTRAL DISTRICT OF CALIFORNIA

17 REPUBLIC BAG, INC., a California
18 Corporation; and ALPHA INDUSTRIES
19 MANAGEMENT, INC., a Florida
20 Corporation,

21 Plaintiffs,

22 v.

23 BEAZLEY INSURANCE COMPANY,
24 INC., a Connecticut Corporation;

25 Defendant.

Case No. 2:18-cv-06745-R-PJW

**MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT OF MOTION FOR
LEAVE TO SUPPLEMENT
COMPLAINT PURSUANT TO
FED. R. CIV. P. 15(d)**

**Date: June 29, 2020
Time: 10:00 am
Location: Courtroom 5A**

Hon. Michael W. Fitzgerald

1 **I. INTRODUCTION**

2 Plaintiffs Republic Bag, Inc. and Alpha Industries Management, Inc.
 3 (“Plaintiffs”) respectfully request leave to supplement their complaint in this
 4 insurance coverage action against Defendant Beazley Insurance Company, Inc.
 5 (“Defendant” or “Beazley”). Plaintiffs make this motion pursuant to Federal Rule of
 6 Civil Procedure 15(d), which “permit[s] a party to serve a supplemental pleading
 7 setting out any transaction, occurrence, or event that happened after the date of the
 8 pleading to be supplemented.” Plaintiffs seek leave in order to add claims for breach
 9 of contract and breach of the covenant of good faith and fair dealing. These claims
 10 arise from Beazley’s recent refusal to pay a substantial portion of Plaintiffs’ January
 11 23, 2020 settlement in the underlying lawsuit captioned *Chris Cervantes v. Republic*
 12 *Bag, Inc., et al.*, Case No. RIC1802922 (Riverside County 2018) (the “*Cervantes*
 13 *Lawsuit*”), even after the Ninth Circuit ruled on February 7, 2020, that Beazley could
 14 not rely on the Policy’s Pending and Prior Litigation Exclusion to deny all coverage
 15 for the *Cervantes* Lawsuit. Despite the Ninth Circuit’s ruling, Defendant improperly
 16 asserted in its recent May 22, 2020 Answer that the Pending and Prior Litigation
 17 Exclusion bars coverage for the *Cervantes* Lawsuit. Leave to supplement should be
 18 freely granted in order to allow Plaintiffs to add claims based on these events which
 19 occurred after the filing of the original complaint.

20 **II. BACKGROUND**

21 Plaintiffs filed this action in Los Angeles Superior Court on July 6, 2018. Dkt.
 22 Dkt. No. 1 Ex. A. On August 8, 2018, Beazley removed this insurance coverage
 23 action to federal court. Dkt. No. 1. On August 27, 2018, Beazley moved to dismiss
 24 this case, on the basis of the Policy’s “Pending and Prior Litigation Exclusion” for
 25 any claim “based upon, a rising out of, directly or indirectly resulting from or in
 26 consequence of, or in any way involving . . . any demand, suit or other proceeding
 27 pending . . . against any Insured on or prior to [April 20, 2017], or any Wrongful Act,
 28 fact, circumstance or situation underlying or alleged therein.” Dkt. No. 9. In its

1 motion, Beazley asserted “on or about September 13, 2016, [Cervantes] testified in a
2 civil trial against Republic Bag,” and “then, on March 22, 2017, Cervantes filed with
3 the California Department of Fair Employment and Housing (‘DFEH’) a Complaint
4 of Employment Discrimination against Republic Bag, Alpha Industries, and others.”
5 Dkt. No. 9-1 at 3. Beazley argued that “the *Cervantes* action falls squarely within
6 the scope of [the Pending and Prior Litigation] exclusion insofar as that suit arises
7 out of both the 2016 trial in which Cervantes gave testimony and the March 2017
8 DFEH Complaint he filed. Both of these were pending prior to April 20, 2017.” *Id.*
9 at 1-2. On October 18, 2018, Judge Manuel L. Real granted Beazley’s Motion to
10 Dismiss. Dkt. No. 22.

11 On October 30, 2018, Plaintiffs timely filed a notice of appeal to the Ninth
12 Circuit. Dkt. No. 23. On February 7, 2020, the Ninth Circuit reversed: “The district
13 court erred in granting Beazley’s motion to dismiss on the ground that the insurance
14 policy’s Pending and Prior Litigation Exclusion [] barred coverage for the *Cervantes*
15 Lawsuit. . . . An insurer may rely on an exclusion to deny coverage only if it provides
16 *conclusive evidence* demonstrating that the exclusion applies. First, the Exclusion
17 does not conclusively bar coverage for the *Cervantes* lawsuit based on that suit’s
18 connection to the *Garcia* action. Although some of the allegations in the *Cervantes*
19 complaint ‘aris[e] out of’ or ‘involve[e]’ the *Garcia* suit, others, such as the
20 allegations of age discrimination and failure to prevent age-based discrimination, are
21 unrelated. The insurance policy contains an express allocation provision, providing
22 for situations like this where a claim may contain both covered and excluded matters.
23 Interpreting the insurance policy to give effect to the allocation provision, we
24 conclude that while some claims in the *Cervantes* lawsuit involve the *Garcia* action,
25 that does not mean that coverage for the entire lawsuit is precluded. Second, the
26 Exclusion does not conclusively bar coverage for the *Cervantes* lawsuit based on that
27 suit’s connection to the complaint filed with California’s Department of Fair
28 Employment and Housing (‘DFEH’). . . . Beazley cannot conclusively show that the

1 DFEH complaint constitutes a ‘proceeding’ within the meaning of the Exclusion.”
 2 Declaration of Kirsten C. Jackson (“Jackson Decl.”) at Ex. A, p. 2.

3 Earlier this year, the *Cervantes* lawsuit was mediated and then settled. Beazley
 4 did not participate in the mediation or contribute to the settlement. Jackson Decl. at
 5 ¶ 3. Nonetheless, and despite the Ninth Circuit’s recent determination that the
 6 Pending and Prior Litigation Exclusion does not apply to the *Cervantes* Lawsuit,
 7 Beazley refused to cover the *Cervantes* Lawsuit, and even asserted in its recent May
 8 22, 2020 Answer that the Pending and Prior Litigation Exclusion bars coverage for
 9 the *Cervantes* Lawsuit. Dkt. No. 37. As a result, Plaintiffs’ seek to supplement their
 10 original complaint, to add claims for breach of contract and breach of the covenant
 11 of good faith and fair dealing arising out of Beazley’s improper conduct this year. A
 12 true and correct copy of the proposed supplemental complaint is attached as Exhibit
 13 B to the Jackson Declaration.

14 **III. ARGUMENT**

15 Federal Rule of Civil Procedure 15(d) “permit[s] a party to serve a
 16 supplemental pleading setting out any transaction, occurrence, or event that happened
 17 after the date of the pleading to be supplemented.” Supplemental pleadings are
 18 “favored,” as they allow “a court to award complete relief, or more nearly complete
 19 relief, in one action, and to avoid the cost, delay and waste of separate actions which
 20 must be separately tried and prosecuted.” *Keith v. Volpe*, 858 F.2d 467, 475 (9th Cir.
 21 1988). Courts “liberally construe Rule 15(d) absent a showing of prejudice to the
 22 defendant.” *Id.* “[I]t is the consideration of prejudice to the opposing party that
 23 carries the greatest weight. Prejudice is the touchstone of the inquiry.” *Eminence*
 24 *Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003). Absent prejudice,
 25 “there exists a presumption” in favor of granting leave to amend or supplement a
 26 complaint. *Id.*

27 The party seeking leave need only establish the reason why amendment is
 28 required. The burden is then on the party opposing the motion to convince the court

1 that “justice” requires *denial*. Hon. Virginia A. Phillips & Hon. Karen L. Stevenson,
 2 Rutter Group Practice Guide: Federal Civil Procedure Before Trial, California &
 3 Ninth Circuit Edition at 8:1489 (Rutter Group April 2020); *see also Serpa v. SBC*
 4 *Telecommunications, Inc.*, 318 F.Supp.2d 865, 870 (N.D. Cal. 2004) (“The party
 5 opposing leave to amend bears the burden of showing prejudice.”).

6 Justice requires granting leave to supplement here. Plaintiffs seek leave in
 7 order to add claims for breach of contract and breach of the covenant of good faith
 8 and fair dealing. The breach of contract and bad faith claims arise from Beazley’s
 9 refusal to pay a substantial portion of the Plaintiffs’ January 23, 2020 settlement in
 10 the underlying *Cervantes* Lawsuit. The bad faith claim further arises from Beazley’s
 11 reliance on the Policy’s Pending and Prior Litigation Exclusion to bar all coverage
 12 for the *Cervantes* Lawsuit *after* the Ninth Circuit’s February 7, 2020, decision,
 13 including in its May 22, 2020, answer to the original complaint. Dkt. No. 37.
 14 Beazley cannot show any prejudice from granting leave to supplement the complaint
 15 to add these allegations of recent misconduct. Discovery has not yet even begun, and
 16 the cutoff for discovery is not until March 12, 2021, so Beazley faces no prejudice
 17 whatsoever from the addition of the breach of contract and bad faith claims.

18 **IV. CONCLUSION**

19 For at least the foregoing reasons, this Court should grant Plaintiffs’ Motion
 20 for Leave to Supplement Complaint.

21 Dated: June 1, 2020

KASOWITZ BENSON TORRES LLP

23 By: /s/ Kirsten C. Jackson

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 28 and Alpha Industries Management, Inc.